UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SCHUYLKILL MEDICAL CENTER
SOUTH JACKSON STREET, d/b/a
LEHIGH VALLEY HOSPITAL - SCHUYLKILL
SOUTH JACKSON STREET,

Case Nos. 04-UC-200537
04-UC-200541

and

SCHUYLKILL MEDICAL CENTER
EAST NORWEGIAN STREET, d/b/a
LEHIGH VALLEY HOSPITAL - SCHUYLKILL
EAST NORWEGIAN STREET,
Employer

and

SEIU HEALTHCARE PENNSYLVANIA,
Petitioner

EMPLOYEE-INTERVENORS' REQUEST FOR REVIEW

Pursuant to National Labor Relations Board ("NLRB" or "Board") Rules & Regulations §§ 102.67 and 102.71, Joseph J. Rittle, Jane DeStefano, Christine Weidensaul, Mary Ann Novack, Maureen Howard, Mary Garraway, and Karlene L. Guzick (collectively, "Employee-Intervenors") submit this Request for Review of Regional Director Dennis P. Walsh's ("Regional Director") Decision, Order, and Clarification of Bargaining Unit, dated October 6, 2017.[1] Employee-Intervenors are employed by Schuylkill Medical Center East Norwegian Street, d/b/a Lehigh Valley Hospital-Schuylkill East Norwegian Street ("East"). Employee-Intervenors are not members of SEIU Healthcare Pennsylvania ("SEIU" or "Union") and do not wish to be represented by it. In fact, the SEIU attempted to organize East in 2016, but was unsuccessful.

[1] The Regional Director's Decision, Order and Clarification of Bargaining Unit will be cited to as "RD."

Despite Employee-Intervenors' and their colleagues' publically expressed wishes, the Union petitioned NLRB Region 4 to clarify its current bargaining units at Schuylkill Medical Center South Jackson Street, d/b/a Lehigh Valley Hospital-Schuylkill South Jackson Street ("South") to include these non-unionized employees.[2] Over the objection of South and East (collectively, "Employer"), the Regional Director accreted the East employees into the bargaining units represented by SEIU.

The unique facts of this case warrant Board review and reconsideration of portions of the Board's accretion standard. To hold otherwise would allow a minority of employees transferring to a different workplace to swallow up a majority of employees in a historically distinct unit. Here, East employs 160 employees. Pursuant to the terms of an Integration Agreement, 68 employees from South have permanently moved to East. At most, 125 South employees have ever worked at East for any amount of time. Jt. Ex. 2.[3] The Regional Director ruled that because of the transfer of these South employees, who constitute a minority of employees at East, the 160 employees—who only months ago rejected Union representation—are now part of South's bargaining unit. The Union's "Trojan Horse" requires the 160 East employees to abide by a contract that has already been negotiated by the SEIU to explicitly only cover South employees, merely because a minority of employees who transferred to East are represented by SEIU.

The Regional Director's application of the Board-created accretion doctrine denies Employee-Intervenors' statutory right to decide their representational preferences under Sections

[2] For purposes of this Request for Review, the two bargaining units represented by SEIU at South will be referred to as a single bargaining unit, "employees" will be defined as individuals in job classifications that SEIU either represents or requested to represent through their Petition for Clarification, "South employees" will refer to individuals in the bargaining unit represented by SEIU notwithstanding their transfer and/or rotation to East, and "East employees" will refer to the 160 non-unionized employees at East.

[3] The Regional Director failed to take into account the degree of interchange. Some of the South employees who worked at East only rarely did so. For example, Ms. Delgado covered a total of three shifts at East, the most recent being January 24, 2017. TR. 400.

7 and 9 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 157 & 159. The current accretion standard used by the Board utterly fails to take into account the fundamental purpose of the Act: employee free choice.

Thus, Employee-Intervenors submit this Request for Review of the Regional Director's Decision and Clarification of Bargaining Unit. Employee-Intervenors submit that their expressed representational preferences should have been taken into account by the Regional Director, but were not. They do not want to be represented by the Union, and should not have been included in the bargaining unit without an election. Employees contend that the current accretion doctrine is contrary to the purpose of the Act and should be revised to more fully take employee preferences into account. At the very least, the standard must be modified to include the wishes of the employees being accreted.

This is also a case of nationwide importance, because this fact pattern recurs constantly in a dynamic economy as companies merge, consolidate, and acquire one another. For this reason, this case is especially worthy of being reviewed by this Board.

FACTS

Historically, East and South were two separately owned hospitals. Jt. Ex. 2. East employees have never been represented by a union. *Id.* South employees have been represented by SEIU or its predecessor since 1974. *Id.* The parties stipulated that the bargaining unit of South employees represented by SEIU is comprised of 220 employees, and East employs 160 employees. *Id.*

In 2008, South and East merged ownership under the name Schuylkill Health System ("SHS") and continued to function as independent hospitals. In 2014, SHS began working on a plan to consolidate some services from South to East. In 2015, SHS began negotiating with

SEIU over an Integration Agreement regarding the effect of this consolidation on South employees. One of the Employer's goals during these negotiations "was to ensure that we did not allow an accretion to occur and that the East employees had the opportunity to vote and make that decision for themselves." TR. 74.[4] The Employer also wanted to make sure South employees were able to retain their seniority if they transferred to East. *Id.* at 75. During negotiations, SEIU sought the accretion of the East employees into their bargaining unit at South, and the Employer refused on the basis that it would deny the East employees the right to vote whether they wanted the Union's representation. However, SHS agreed to allow South employees who were transferred to East to retain their membership in the South bargaining unit. *Id.* at 26. The Integration Agreement specifically states the collective bargaining agreement would not otherwise apply to East. *Id.* at 77; Union Ex. 8.

Sometime in the Spring or Summer of 2016, the Union began an organizing campaign of East. This campaign included approaching employees of East at their homes to discuss union membership. *See* Declarations attached as Ex. 1 to the Motion to Intervene, filed simultaneously herewith (hereinafter, "Employee Declarations"). Union President Brian Symons took a three month leave of absence from his job at South in the Spring 2016 to organize East. TR. 96-97. Despite its efforts, the Union was unsuccessful in the campaign and did not file a representation petition. *Id.*

In September 2016, Lehigh Valley Health Network acquired SHS. On April 24, 2017, Employer and the Union reached a tentative collective bargaining agreement ("CBA"), which maintained the Integration Agreement. This agreement was ratified by the South bargaining unit on April 27, 2017. Jt. Ex. 2.

[4] References to the hearing transcript are denoted by "TR."

Notwithstanding the Integration Agreement, on June 12, 2017, the Union filed two petitions for unit clarification to add the East employees into the South bargaining units it represents. The Regional Director agreed with the Union and clarified the bargaining units at South to include East employees.

ARGUMENT

A. The Regional Director Erred In His Decision to Accrete the East Employees into the Bargaining Unit Represented by SEIU.

1. Accretion is Inappropriate Pursuant to the Board's Current Standard.

"The Board has defined an accretion as 'the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representatives.'" *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992) (quoting *Safeway Stores, Inc.*, 256 NLRB 918, 924 (1981)). The Board considers accretion to be the exception to the rule of employee self-determination, applying it "restrictively, so as not to tread too heavily on the right of employees to choose their own collective bargaining representative." *N.Y. Rehab. Care Mgmt. v. NLRB.*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citing *Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 595 F.2d 844, 851 (D.C. Cir. 1979); *Passavant Ret. & Health Ctr., Inc.*, 313 NLRB. 1216, 1218 (1994)). The Board "will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret ballot election." *Melbet Jewelry Co., Inc.*, 180 NLRB 107, 110 (1969).

Currently, the "Board finds 'a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit

and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted.'" *NV Energy, Inc.*, 362 NLRB No. 5 (Jan. 30, 2015) (quoting *Safeway Stores*, 256 NLRB at 918). To determine whether the standard has been met, the Board considers the following factors: (1) "integration of operations"; (2) "centralization of management and administrative control"; (3) "geographic proximity"; (4) "similarity of working conditions"; (5) "skills and functions"; (6) "common control of labor relations"; (7) "collective bargaining history"; (8) "degree of separate daily supervision"; (9) and "degree of employee interchange." *Id.* (citing *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001)). According to the Board, the "'two most important factors'—indeed, the two factors that have been identified as 'critical' to an accretion finding—are employee interchange and common day-to-day supervision." *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005) (quoting *E.I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 608 (2004)).

Notably, employees representational preferences are not listed. As discussed *infra*, Section B, ignoring unrepresented employees wishes repudiates the goals of the Act. Even within the current anti-employee framework, however, the East employees do not meet the Board's criteria for a valid accretion. Employee-Intervenors highlight some of the factors below.

First, the Board's definition restricts an accretion to a "relatively small" group of employees. *See Safety Carrier*, 306 NLRB at 969; *Safeway Stores*, 256 NLRB at 924. Here, the original bargaining unit of South employees had 220 members. The current clarification to include East employees accretes *160* additional employees into the bargaining unit. This is a 72.73% increase in bargaining unit membership, not a small increase by any mathematical measure. Accretions of this size and scope—which radically transform the bargaining unit—should be disfavored.

The Regional Director cited *Special Machine & Engineering*, 282 NLRB 1410 (1987) to support his decision. This decision, however, is distinguishable. In that case, the unrepresented individuals were transferred to a plant represented by the union and "merged into a single productive entity." *Id.* Here, there is no such single entity because the two hospitals are still separate facilities, and the non-union individuals were not transferred from a defunct facility to a unionized workplace. Instead, Union members from South were allowed to maintain their membership in the bargaining unit and transfer to East.[5]

Second, the Regional Director erred by overstating the degree of interchange and shared management between the two groups of employees. "One aspect of this long-standing restrictive policy . . . has been to permit accretion 'only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.'" *Frontier Tel.*, 344 NLRB at 1271 (quoting *E.I. Du Pont*, 341 NLRB at 608). These hospitals (and thereby the employees within) have not lost their separate identities. East and South retain separate operating licenses. Jt. Ex. 2. East and South have their own payroll and job descriptions. TR. 376. East employees and South employees have different terms and conditions of employment. *See* TR. 317-19. East

[5] In *Special Machine*, the Board's rationale was also based, in part, on employer gamesmanship. It noted: "we will not permit an employer to capitalize on its decision to consolidate a smaller group with its larger, represented group to justify terminating its long-term bargaining relationship with the majority representative." *Id.* at 1411. Here, it is the Union who capitalized on its decision to agree to the integration plan rather than continuing to pursue an accretion during bargaining or petitioning for clarification of the bargaining unit at that time. Pursuant to the integration plan, a minority of South employees infiltrated East and were allowed (by negotiated agreement) to remain members of the South bargaining unit, with the stipulation that the CBA would not extend to East in any other manner. Here, it is the Union who is employing gamesmanship—using the Integration Agreement to allow South employees to remain part of their original bargaining unit as a backdoor to gaining additional bargaining unit members, a gain they could neither achieve through organizing nor bargaining. This type of dealing is not favored by the Act. *Aero Eng'g Co.*, 177 NLRB 176, 176 (1969) (action that "constitute an inducement to 'gamesmanship . . . would not effectuate the policies of the Act").

employees have not transferred to South. Jt. Ex. 2 at Ex. B. Rather, some South employees have transferred (in many instances, permanently) to East. Jt. Ex. 2.

Third, the Regional Director inflated the integration of day-to-day supervision. For example, the Dietary employees at South and East have their own supervisory staff. TR. at 365; Jt. Ex. 2 at Ex. B. Moreover, East employees' housekeeping and dietary groups work under the direction of "Lead" workers, while the South groups do not. TR. at 369-370; Jt. Ex. 2 at Ex. B. Additionally, many South and East employees work under the direction of their respective supervisors at each hospital. Jt. Ex. 2 at Ex. B.; TR. 355-356. While it is true that at East, the South employees who have been permanently transferred to East share many of the same supervisors with East employees, South employees constitute the minority of employees at East. *See* Jt. Ex. 1. Based on the entire record, this part of the test does not favor an accretion.

Fourth, the collective bargaining history repudiates any finding of accretion. South's employees have traditionally been represented by the Union. East's employees have never been represented by a union. Most significantly, the history here unequivocal: East employees do not want a union. In fact, East employees rejected the Union's 2016 organizing campaign, which included door-to-door solicitation and the Union President taking a three month leave of absence from his employment to organize East. *See* Employee Declarations; TR. 96-97. The Regional Director improperly uses SEIU's collective bargaining history as evidence that East has a history of unionization because a minority of employees currently at East are South employees represented by the Union. RD at 19. However, a traditionally non-unionized hospital with a majority of employees who rejected the Union's attempts to organize should militate against accretion of the East employees.

On balance, taking into account all of the accretion factors and the Board's restrictive application of the policy, the Regional Director's finding of an accretion and clarification of the bargaining units to include the employees at East extends the accretion doctrine far beyond its narrow, restrictive parameters. The evidence presented demonstrated there is a "separate group identity" and an insufficient "community of interest" to find an accretion, and, accordingly, the Board should grant review to reverse the Regional Director's decision.

2. SEIU's Petition is Improper on Procedural Grounds.

The Regional Director further erred in his conclusion that the Union's petitions for clarification were procedurally proper. With respect to the waiver claim, the Regional Director found that the Employer's and Union's Integration Agreement, specifically Subsection N, was an insufficient waiver of the Union's ability to seek unit clarification. Subsection N states:

> While the collective bargaining agreement continues to apply to bargaining unit employees working at either facility, it does not apply to East except by virtue of this Agreement. Union representatives will be permitted access to the East facility to meet with bargaining-unit employees according to the terms of Article 3.2.

Union Ex. 8. The Regional Director concluded that this provision did not mean that the Union agreed that the CBA would not apply to East except by way of the Integration Agreement, but it merely meant that the Employer "did not intend to voluntarily extend coverage of the parties' collective-bargaining agreement to East employees beyond what was set forth in the immediately preceding subsection." RD at 7. The Regional Director's myopic conclusion is contrary to the actual text of the Integration Agreement. *See* Union Ex. 8. The Integration Agreement was not a mere statement of position by the Employer, the Union also agreed that the CBA would not

extend to East employees, thereby waiving its right to extend the CBA to East employees through other means.[6]

The Regional Director supports his conclusion that Subsection N was not a clear waiver with the fact that the Employer did not tell the Union that they could not petition for clarification because it waived the right to do so. RD at 8. The Employer does not have a duty to provide the Union with legal advice on what they can or cannot do. Moreover, Employer's chief negotiator during the Integration Agreement negotiations, Vincent Candiello, testified that he believed that the Union had waived their ability to seek unit clarification from the Region, but also believed that the Union could always file a petition, albeit an unsuccessful one because they waived their ability to accrete the East employees without an election. TR. 114-16. Thus, the Regional Director erred in his conclusion that the Union had not waived its ability to file for a unit clarification.

The Regional Director also found that petition was timely filed after the parties had entered into a tentative collective bargaining agreement. "The Board generally declines to clarify bargaining units midway in the term of an existing collective-bargaining agreement that clearly defines the bargaining unit. To do otherwise, the Board has held, would be unnecessarily disruptive of an established bargaining relationship." *St. Francis Hosp.*, 282 NLRB 950, 951 (1987) (internal citations omitted) (citing *San Jose Mercury & San Jose News*, 200 NLRB 105 (1972); *Wallace-Murray Corp.*, 192 NLRB 1090 (1971)). The Regional Director held that the Union's petitions were exceptions to this rule because:

[6] The Regional Director states that his reading "is not in conflict with the present petitions because the Petitioner could have agreed that SHS was not voluntarily extending the contract's coverage to all East employees while still reserving its right to accrete the East employees through Board proceedings." RD at 7. However, what the parties "could" have agreed to is irrelevant. On the face of the document, the Union agreed that the CBA would not extend to East employees.

> [T]he interests of stability are better served by entertaining a unit-clarification petition during the term of a contract . . . where the parties cannot agree on whether a disputed classification should be included in the unit but do not wish to press this issue at the expense of reaching an agreement, the Board will entertain a petition filed shortly after the contract is executed, absent an indication that the petitioner abandoned its request in exchange for some concession in negotiations.

RD at 9 (quoting *St. Francis*, 282 NLRB at 951). Based on this, the Regional Director found that, notwithstanding the actual Integration Agreement regarding how the South employees and East employees were to be treated going forward and the CBA, which did not mention accretion, the Union reserved its right to petition the Region for clarification of the unit.

This ruling, and exception, is particularly harmful to the rights of the Employee-Intervenors and their East employee colleagues under the Act. In this case, the Union did not petition for an accretion and the parties reached an agreement that did not include the East employees. At the time the contract was entered into, the Union had no connection in any legal or representative manner with the East employees. Additionally, the CBA was ratified before the Regional Director's decision to forcibly include the East employees into the South unit and Union representation, thereby depriving them of the ability to vote on the contract, to exercise what little control they may have had over the terms and conditions of their employment. Moreover, the existence of the contract may preclude the East employees from successfully holding a vote to decertify the Union should they choose to do so, as another Board doctrine, the contract bar, precludes a decertification election in most instances for up to three years or until the expiration of the CBA. The Union's delay in filing for a clarification of the unit until after the contract was ratified thus further injures the Section 7 rights of East employees. To the extent that current Board precedent allows for this unjust outcome, it should be reconsidered and the Regional Director's decision reversed.

B. The Standard for a Valid Accretion Should Be Modified to Take into Account Employee Preferences.

The current accretion doctrine is not found in any provision of the NLRA and is contrary to its text and purpose. The current test ignores the wishes of the employees being accreted into a union's bargaining unit—the individuals most directly affected by this change, and the rights of which the Act is designed to protect. *See McCormick Const. Co.*, 126 NLRB 1246, 1259-60 (1960) (emphasis added), quoting *Shoreline Enter. of Am., Inc. v. NLRB*, 262 F.2d 933, 944 (5th Cir. 1959) ("The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It is also a *guardian of individual employees*."). In fact, "the NLRA confers rights *only on employees*," and any privileges that a labor union enjoys are merely derivative of the employees' Section 7 rights. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis added); *New York New York, LLC*, 356 NLRB 907, 914 (2011); *Leslie Homes, Inc.*, 316 NLRB 123, 127 (1995). "If the rights of employees are being disregarded," it is incumbent upon the Board "to take affirmative action to effectuate the policies of the Act" and ensure that "those rights be restored." *McCormick Const.*, 126 NLRB at 1259.

The stated policies of the Act are: "*encouraging* the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (emphasis added). The ability of a union to shoehorn additional groups of individuals into a bargaining unit without an election *compels* rather than "encourages" collective bargaining, and *deprives* employees of their freedom of association and their freedom to designate (or not to designate) a representative to bargain on their behalf. It undermines the

Act's policies to force employees to be represented by a union who is a stranger to the workplace and is not the selected representative of the employees.

The Act itself makes no mention of accretion. Instead, it specifically states that exclusive representation will only be bestowed upon labor organizations that have majority support: "Representatives designated or selected for the purposes of collective bargaining by *the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a) (emphasis added). Moreover, in determining an appropriate bargaining unit, the Board is "to assure to employees the fullest freedom in exercising the[ir] rights guaranteed by [the Act]." *Id.* at § 159(b). The current accretion standard is contrary to both of these provisions because: (1) it allows a union to add members to its bargaining unit and maintain its exclusive representative status without having to prove that it has the majority support of the newly expanded unit; and (2) employee freedom and the rights guaranteed under the Act to be (or not to be) represented by a union are not served when the Board "clarifies" a unit to include employees without their consent or input.

"The law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of that section, because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 762 (1961) (citing *NLRB v. Pa. Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938)). An accretion where the accreted employees constitute a large portion of the bargaining unit, could easily result in the Board presuming the majority support of a minority union. This anomaly is highlighted in this case where many of the individuals accreted—nearly half of the new bargaining unit—do not support union representation. Indeed, the Union tried and failed to organize East employees in 2016. *See*

Employee Declarations; TR. 96-97. These employee desires (which should be the very genesis of the Union's exclusive representation) are regarded as irrelevant in the current accretion analysis.

Employee-Intervenors and their East employee colleagues do not want to be represented by SEIU. *See id.* Yet the Regional Director took no notice of their choice in his analysis of the case. In fact, the hearing officer flatly stated: "the opinion of employees, for better or for worse, is not relevant to an accretion determination," TR. 162, and affirmed that "testimony from [] employees as to what they understood or what they want is irrelevant to this proceeding . . . ." *Id.* at 172. As such, accretion ignores employees' core Section 7 right to freely choose or reject a bargaining agent, a right that is the very "essence of Section 7." *McDonald Partners, Inc.*, 336 NLRB 836, 839 (2001) (Chairman Hurtgen, dissenting). The Board recognized this "fly in the ointment" and attempted to rectify it by restrictively applying accretion because "it is reluctant to deprive employees of their basic right to select their own bargaining representative." *Gitano Group, Inc.*, 308 NLRB 1172, 1174 (1992). However, a standard of "reluctance" to deprive employees of their right to choose their exclusive bargaining representative is insufficient. The Board was designed to protect Section 7 rights, not merely be reluctant to throw them away when it benefits a union (or an employer) to do so.

Such a cavalier approach to employee rights has been soundly rejected by the federal courts. For example, in *Nova Plumbing, Inc.*, 336 NLRB 633, 636-67 (2001), *reversed sub nom. Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003), the Board deferred to a contractual agreement between an employer and union, stating that the union had majority employee support, even though there had been no independent verification of the truth of that assertion. The D.C. Circuit reversed, holding that "[b]y focusing exclusively on employer and

union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to . . . egregious violations . . . ." *Nova Plumbing*, 330 F.3d at 537. Here, the Regional Director focused only on the SEIU's desires, despite the fact that Employee-Intervenors have an overriding interest in ensuring that their right to determine whether they want to be represented is upheld.

Employees' interest in choosing, or not choosing, an exclusive representative is not merely academic. Section 9(a) grants unions extraordinary powers. As exclusive representative, a union has the authority to speak and contract for all employees in a unit to the exclusion of these employees, and irrespective of whether individual employees approve or not. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944). This authority "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees," meaning represented employees are no longer be able to deal directly with their employer. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200 (1944); *Georgia Power Co.*, 342 NLRB 192 (2004) (holding it unlawful under NLRA for employer to directly deal with individual employees concerning mandatory subjects of bargaining when those employees have an exclusive representative). An individual employee "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180. The Supreme Court has recognized that this constitutes a "loss of individual rights." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

Exclusive representation turns normal agency relations upside down, unlike the traditional agency framework, the principal does not control or direct the agent. *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990) ("[A]n individual employee lacks direct control over a

union's actions."). Unions can and do bar represented nonmembers from even attending union meetings or voting on critical workplace matters. *See, e.g., NLRB v. Fin. Inst. Employees of Am., Local 1182*, 475 U.S. 192 (1986); *Am. Postal Workers (Postal Serv.)*, 300 NLRB 34 (1990). Overall, an exclusive representative's "powers [are] comparable to those possessed by a legislative body both to create and *restrict the rights* of those whom it represents." *Steele*, 323 U.S. at 202 (emphasis added).

Exclusive representatives can, and often do, pursue agendas and enter into agreements that represented employees oppose and that harm employees' interests. These include contractual clauses that require non-members to pay compulsory fees to the union as a condition of their employment, and clauses that require employers to: (1) collect dues and fees from employees' paychecks for the union, *see* 29 U.S.C. § 186(c)(4); (2) provide the union with continually updated lists of information about all employees, including personal contact information; (3) contribute to union-operated healthcare, pension, and training funds on which union officials sit as paid trustees, *id.* at § 186(c)(5-8); and (4) allow employees to conduct union business on work time, *e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1058-59 (9th Cir. 2004). Certainly if employees wish to delegate their rights to speak for themselves, they are able to do so through the representation procedures outlined in the Act. However, unions should not be able to silence and speak for new groups of employees without accounting for the representational preferences of the individuals the union wishes to represent.

Finally, there is no legitimate justification for the current policy, particularly as applied to the East employees. The Regional Director cites industrial stability as the purpose behind accretion, but fails to explain how this accretion satisfies its stated purpose. RD at 5; *see also NV*

Energy, Inc., 362 NLRB No. 5, at 3 ("The purpose of the accretion doctrine is to preserve industrial stability . . . ."). Industrial stability is not served, as illustrated by this litigation, the Employer's objections, the prolonged collective bargaining negotiations, the Union's failed election campaign, and the Employee-Intervenors' intervention in this proceeding. No party, save the Union, is better served by including Employee-Intervenors and their East colleagues into the bargaining unit represented by the Union. East employees are not better served by having their freedom to choose their representative stripped from them. The Employer is obviously not better served—if it were, it would not be vigorously opposing the Union's attempts to accrete the East employees. South employees are not better served—per the Integration Agreement, they keep their status as members of the SEIU represented bargaining unit and the protection of the CBA regardless of whether they transfer to East. *See* Union Ex. 8. Labor peace is not served by forcing employees to accept, without an election, a compulsory representative who's overtures they rejected only months ago. Rather, industrial stability is better served when employees are able to choose whether they want to be represented, and when any bargaining representative is supported by a majority of those it represents. The Union is the only entity who stands to benefit from an accretion by acquiring 160 additional dues or fee payors.

An election to determine whether East employeees should be represented by SEIU and included in the current bargaining unit is the only way to ensure that the polices of and the rights in the Act are upheld. At a minimum, the Board should reevaluate its accretion standard and incorporate employee preferences toward union representation as the most important factor.

CONCLUSION

The Board should grant this Request for Review and should reverse the Regional Director's Decision, Order, and Clarification of Bargaining Unit.

Respectfully submitted,

Date: November 3, 2017

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